RECENT CASES.

ACCORD AND SATISFACTION.

State Statutes Changing Common Law Rule of Foakes vs. Beer

An agreement to accept less than the liquidated amount of a debt in discharge thereof will operate as a good accord and satisfaction if actually executed by payment of agreed amount. *Phinzy* v. *Bush,* 59 S. E. Rep. 259. Sup. Ct. of Ga. This decision is based upon a Georgia statute, Civil Code (1895), sec. 3735, and is directly contra to the common law rule of *Foakes* v. *Beer,* 9 App. Cas. 605

The following states have also abolished the common law rule by statute:

Alabama—Ala. Code (1876), sec. 2774;
California—Civil Code (1894), sec. 1524;
Maine—Rev. St., Ch. 82 sec. 45;
North Carolina—Code, sec. 574;
North Dakota—Rev. Code, sec. 3827;
Oregon—Hills Amer. Laws, sec. 755;
South Dakota—Comp. Laws, sec. 3486;
Tennessee—Code (1884), sec. 4539;
Virginia—Code (1897), sec. 2858;

Mississippi abolished the rule by decisions without statute—*Clayton* v. *Clark,* 74 Miss. 499. By decision, also, in some states a parol debt may be satisfied if the creditor gives a receipt in full for a partial payment—*Green* v. *Langdon,* 28 Mich. 221; *Lemprey* v. *Lemprey,* 29 Minn. 151; *Gray* v. *Barton,* 55 N. Y. 68; *Ferry* v. *Stephens,* 66 N. Y. 321.

AGENCY.

Failure to Renew Lease: Tort: Breach of Fiduciary Duty

A lessee's agent with instructions to renew the lease of his principal, renewed it for himself at the old rental. He finally assigned the lease to his principal, but the landlord refused to consent. This agent procured others to try to obtain the lease for him. Due to their high offer, the principal was finally compelled to pay an additional thousand dollars rental in order to procure the lease for himself. *Held,* The agent was

CONFLICT OF LAWS.

liable in tort for the loss sustained by the principal—See note, page.

Telegraph Company: Failure to Deliver Message

A, in Tennessee, sent a telegram to B, in Arkansas, to call B to the funeral of a near relation. The telegram was lost in transit before it reached the state of Arkansas. B sued the telegraph company in Arkansas to recover damages for "mental anguish." *Held,* though he could not recover under the Arkansas statute, which gives a cause of action to the addressee when the negligence is shown to have occurred within the state, yet he could recover under the decision of the courts of Tennessee, which permit the addressee of a telegram to sue on the contract of the sender, to recover for mental anguish. Supreme Court of Arkansas, in *W. U. T. Co.* v. *Woodward,* 105 S. W., 578.

In determining what law governs, the ultimate criterion is the intention of the parties, expressed or implied (II Wharton, Conflict of Laws, 1056, 3d ed.). When the addresse of a telegram recovers on the theory that the contract was made for his benefit, it might be said that the parties must have intended that the law of the place of delivery should apply. It was so held in *Howard* v. *Tel. Co.,* 84 S. W., 764 (Ky.); but on the ground that the negligence occurred entirely in Kentucky. But if the recovery is on the contract, it would seem that the place where the negligent act occurred is of no importance in determining what law shall apply. See *Tel. Co.* v. *Cooper,* 29 Tex. Civ. App., 591.

CONSTITUTIONAL LAW.

Police Regulation: Liquor License

The State Legislature of Texas enacted that the Comptroller of Public Accounts shall issue a permit to apply to the county judge of the proper county for a liquor license; that the applicant must show, among other things, (1) that he is a law-abiding, tax-paying, male citizen of the state of Texas, and (2) that he has been a resident of the county wherein such license is sought more than two years next before the filing of such petition. A, a resident of Arkansas, seeks a mandamus to compel B., the comptroller, to issue to him such a permit, alleging that the above require-

CONSTITUTIONAL LAW (Continued).

ments are unconstitutional under Art. 4, Sec. 2, and Art. 14, Sec. 1 of the Federal Constitution. *Held,* (1) that the regulation of the liquor traffic is within the police powers of the state with which the above sections were not designed to interfere, and (2) that this discrimination against non-residents was not a mere guise for discrimination, or without good reason. For it is reasonable that they should be residents of the county, so as to be within the jurisdiction at all times for the enforcement of the law, and to enable the character of the applicant to become known in case of impeachment if it be necessary. *De Grazier* v. *Stephens,* 105 S. W., 992.

A similar case arose in Missouri, in 1843, under Art. 4, Sec. 2, and was then held to be constitutional in *Austin* v. *State,* 10 Mo., 591.

Liquor dealers, saloon-keepers, hawkers, peddlers, theaters, shows, billiard-table keepers, gamblers, brewers, etc., are within the class subject to such police power. *Territory* v. *Connell,* 16 Pac. (Ariz.), 209. So, also, are laundries and professions. *Barbier* v. *Connolly,* 113 Fed., 31. However, where such exercise of the police power works a discrimination against the products of another state, as in the "Dispensary Law" of South Carolina, prohibiting a citizen from buying liquor in another state for his own use in his own state, the act is unconstitutional. *Donald* v. *Scott,* 67 Fed., 857.

The statute providing such regulation may not give to the person whose duty it is to enforce the act an unrestrained will or discretion, but there must be fixed rules by which impartial execution may be secured. *Yick Wo* v. *Hopkins,* 118 U. S., 373.

Municipal Ordinance: Right to Restrain Passage

By ordinance duly enacted under the legislative powers conferred by the legislature, B granted to A the street railway franchise, upon certain conditions. A fulfilled the conditions and put the line into operation at a cost of $75,000. Thereupon B proceeded to pass another ordinance, within its legislative power, repealing the first ordinance. A brings a bill to restrain the mayor and council from passing the ordinance, on the ground that it will impair the obligations of his contract and deprive him of his property without due process of law. *Held,* that though the ordinance would be unconstitutional,

CONSTITUTIONAL LAW (Continued).

equity cannot restrain its passage, because the act involves legislative discretion which is within the sovereign power and protection of the legislative branch of the government. *Missouri* v. *Olathe,* 156 Fed., 624.

That equity cannot restrain the passage of an ordinance, was similarly held in *Alpers* v. *City,* 32 Fed., 503, or the fixing of rates by a commission duly authorized, in *McChord* v. *Railroad,* 183 U. S. 483.

But where irreparable injury would result, equity will restrain the passage of an ordinance if it is *ultra vires* (*Spring Valley,* v. *Bartlett,* 16 Fed., 615), or if the statute authorizing the passage is unconstitutional (*Vicksburg Water Works* v. *Vicksburg,* 185 U. S., 67).

Statute Requiring Payment of Wages in Money

In *Lawrence* v. *Rutland Railroad Company,* 67 Atl. Rep., 1091 (Nov. 16, 1907), the Supreme Court of Vermont sustains the validity of a Vermont statute which provides that a mining, quarrying, manufacturing, mercantile, telegraph, telephone, railroad, or other transportation corporation, and an incorporated express, water, electric light or power company, transacting business in that state, shall pay its employees each week, in lawful money, and prohibiting payment in store orders or other script, forbidding assignments of future wages to such company, or to anyone in its behalf, and prohibiting such a company from exacting from its employees, as a condition of employment, an agreement to accept wages at any other time; and holds that under the reserve power to alter, amend or repeal, the statute (1) is not a deprivation of liberty or property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States; (2) that it is not a denial of the equal protection of the laws, its classification being a reasonable one; (3) that its classification is not void because it includes certain corporations improperly, nor because it operates on foreign corporations as well as domestic but that it is valid as to those properly included, regardless of its effect upon those improperly included; and (4) that it does not infringe the employee's right to contract, the restriction not being direct, but resulting indirectly from the restriction of the employer's right, the restriction being valid as to the employer. See note, p.

CONTRACTS.

Options: Consideration of One Dollar

In consideration of one dollar in hand paid, B agreed in writing to convey to A certain interests in land upon the payment of the agreed price within twelve months. Within the agreed time, B conveyed the said rights to C. A sues B and C for damages for the loss of the contract, alleging conspiracy.

Held, the agreement was without sufficient consideration and B, by the sale to C, withdrew the offer. *Noble* v. *Mann,* 105 S. W. (Ky.), 152.

This decision is the result of the theories of mutuality and sufficient consideration prevailing in Kentucky. This doctrine of mutuality of obligation and liability is the old theory put forth by Lord Redesdale in *Lawrence* v. *Butler,* 1 Schoales & Lefroy, 19; and by Chancellor Kent in the *dicta* of *Parkhurst* v. *Cortland,* 1 Johns. Ch., 282, and *Benedict* v. *Lynch,* Ibid, 370. England rejected the doctrine in *Hatton* v. *Gray,* 3 Ch. Cas., 164. Kent repudiated it in *Classon* v. *Bailey,* 14 Johns. R., 484. New Jersey adhered to it in *Smith* v. *McVeigh,* 3 Stockton, 239, but repudiated it in *Hawralty* v. *Warren,* 18 N. J. Eq., 126. Kentucky adopted it upon the reasoning of Lord Redesdale, in *Baucher v. Vanbuskirk,* 2 A. K. Marshall, 723, and has adhered to it rather strictly down to the case of *Bacon* v. *Kentucky Railroad,* 95 Ky., 376.

To give this mutuality, Kentucky holds that the consideration for the option must be both good and sufficient. A consideration of one dollar is held not sufficient, even though under seal. *Thompson* v. *Reid,* 101 S. W. (Ky.), 964.; *Letz* v. *Gosling,* 93 Ky., 185. Nor will a sufficient consideration be implied in a covenant of lease (*Baucher* v. *Vanbuskirk, supra*), but must be found sufficient in fact. *Bacon* v. *Kentucky Railroad, supra; Bank* v. *Baumeister,* 87 Ky., 11.

These doctrines of consideration and mutuality are *contra* to those generally held in all other jurisdictions, for which see *Hawralty* v. *Warren,* 18 N. J. Eq., 126, and *Adams* v. *Peabody,* 82 N. E. (Ill.), 645, and the cases therein cited.

DISCOVERY.

Exhuming Dead Body

In a suit on an insurance policy which contained a clause preventing recovery in event of death by suicide, it appeared that the insured met his death by falling from the roof of his house. But the circumstances accompanying the accident were highly suspicious, pointing to a deliberate suicide. He had purchased morphine on

DISCOVERY (Continued).

the day of his death and his eyes showed the effect of morphine poisoning. He had, however, been buried without any examination having been made on the part of the insurance companies. The court granted an order permitting the insurance company to exhume the body for examination. *Mutual Life Insurance Co. of New York* v. *Griess,* 156 Fed., 398. See note, page

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FRAUD.

Liability for False Prospectus: Intent

Defendant bank, after having been informed by the Comptroller of the Currency that certain of its assets were doubtful, without any examination of said assets issued a prospectus containing them. After a great part of the doubtful assets had been declared valueless by the Comptroller, plaintiff, having, in reliance upon the prospectus, purchased shares of the bank's stock, brought the present action to recover the price paid for the shares. *Held,* that this report was put out with the intent that it should be published for the information of the public, and for all who would have dealings with the bank and in its stock; and being either actual recklessness of results, or a wilful refusal to make the examination, the defendant was liable. *Taylor* v. *Thomas,* 106 N. Y. Sup., 538. It has been held that where a corporation makes a false representation, for a purpose other than to induce anyone to buy shares, one who buys shares on the faith of the representation has no action against the corporation. *Hunnewell* v *Duxbury,* 154 Mass., 286. Where the directors of a company issue a false prospectus with the intent of inducing the public to buy shares, and one relying on the prospectus buys shares from an original allottee, he has no action against the directors, because there was no intent that the plaintiff should act on it. *Peek* v. *Gurney, L. R.,* 6 *H. L.,* 403. Since the report in the principal case was merely to create a false impression in the business world in order to avert the ruin of the bank, and not to induce the plaintiff to buy shares, there would seem to be here a step in advance. That it is better to hold a man to a strict account for his words and liable to whoever acts on them, whether intended for him or not, is hardly questionable.

JEOPARDY.

What Constitutes Being put in Jeopardy of Life and Limb

After a jury had been sworn and testimony given, a juror was reminded of an occurrence in his father's family years ago, which rendered him biased and unqualified to render an impartial verdict. The jury was thereupon discharged and another impaneled and sworn. The defendant set up his constitutional right against being twice put in jeopardy for the same offence. His plea was overruled. *State* v. *Hansford,* 92 Pac. Rep., 551 (Kansas).

There is a division of authority as to when jeopardy exists. Some jurisdictions hold that one has never been placed in jeopardy until a valid verdict has been returned. *State* v. *Elden,* 41 Me., 165; *People* v. *Meakim,* 61 Hun, 327. The weight of authority, both in numbers and reasoning, holds that when a man is brought face to face with a full jury, duly sworn, he is placed in jeopardy. *United States* v. *Van Vleet,* 23 Fed. Rep., 35; *Alexander* v. *Comm.,* 105 Pa., 1. The difficulty which arises from the latter position is exemplified in cases like the present. Bishop (Crim. Law, Vol. I, Sec. 867-869) reconciles them with the principle by saying that the occurrence which interrupted the trial was certain, though unforeseen, at the time the jury was sworn; so that upon its happening, the whole proceeding was vitiated and jeopardy never existed.

PERPETUITIES.

Suspension of Absolute Power of Alienation: Life Estate

Testator devised certain premises in equal parts to his two sons, on the trust that the part devised to each should be held for his benefit, without power of sale, for life, and he appointed his two sons trustees of the property devised for their own use. *Held,* No trustee having been appointed to hold the legal title during the time the testator's sons should have the beneficial interest, the effect of the devise was to vest in testator's sons a life estate, and the attempt to deprive them of the power of alienation was repugnant to the estate and void. *Street* v. *Fay,* 82 N. E. Rep., 648 (Sup. Ct., Ill.).

In a devise of land in fee simple, a condition against alienation is void, because it is repugnant to the estate devised. *Potter* v. *Crouch,* 141 U. S., 315; Keppele's Appeal, 53 Pa. St., 211. There is some conflict in the decisions as to whether the same rule applies to life estates. *Nichols* v. *Eaton,* 91 U. S.,

PERPETUITIES (Continued).

716. "But where an estate is made to vest without condition—any restriction on the power of alienation is repugnant to the estate devised to the first taker, be it a life estate or a fee simple." *Bank* v. *Davis,* 21 Pick., 42; *Fleming* v. *Harrison,* 76 Ky., 723. "No principle of public policy, or of *stare decisis* establishes the rule that the testator may, without the intervention of a trustee, vest an estate in fee, or for life, with a restriction thereon repugnant to an estate and preventing alienation of the same." *Henderson* v. *Harness,* 176 Ill., 302.

STREET RAILROADS.

Crossing Track: Contributory Negligence

The plaintiff saw an approaching car of the defendant as he was about to cross the latter's tracks. He urged his horse forward, but owing to the excessive speed at which the defendant's car was traveling, a collision occurred before he could clear the tracks. It was held that the plaintiff was not guilty of contributory negligence; nor was he bound to anticipate the unreasonable use of the highway by the defendant. *Indianapolis St. Ry. Co.* v. *Hoffman* (Ind), 82 N. E. Rep., 543.

In *Callahan* v. *Phila. Tract. Co.,* 184 Pa., 425, the principle of the present case was followed, but by later decisions it has in effect been overruled in Pennsylvania (*Keenan* v. *Traction Co.,* 202 Pa., 107), so that the doctrine of the latter state stands in marked contrast with the principal case. In a case practically similar to the one under discussion, binding instructions were given for the defendant. *Timler* v. *Transit Co.,* 214 Pa., 475. This is a direct outgrowth of the Pennsylvania doctrine, which has, by an unbroken line of decisions, held that non-compliance with the injunctions of the "stop, look and listen" signs at steam railway crossings is negligence, *per se. Pa. R. R.* v. *Beal,* 73 Pa., 504. The application of this presumption of law to street railways to the extent of holding it contributory negligence in not looking in both directions immediately before crossing the track, seems to disregard the fundamental difference between the roadbed rights of the two carriers.

The principal case represents the general law on this question. *Cincinnati St. R. Co.* v. *Whitcomb,* 66 Fed., 915; *Weiser* v. *Broaway St. R.,* 10 Ohio, 14.

WILLS—LEGACIES.

Parol Evidence of Intent to Charge on Land

A testator bequeathed pecuniary legacies to various persons, but died intestate as to his realty. It was offered to show by parol evidence that his personal property was insufficient to pay the legacies after satisfying his debts, and that he intended to make such legacies a charge on the realty. *Held,* the evidence was inadmissible. *Fries* v. *Osborne,* 82 N. E. 716 (Ct. of App., N. Y.).

Parol evidence is not admissible to show the intention of the testator as to the disposition of income of a specific legacy before payment of the legacy, where the will is silent in regard thereto. *Loring* v. *Woodward,* 41 N. H., 391; *Goulder* v. *Chandler,* 87 Mo., 63. The intention of the testator cannot be gathered wholly from facts *dehors* the will. *Judy* v. *Williams,* 2 Ind., 449.